Supreme Court, U.S.
FILED
1987

No. 86-6109

In the Supreme Court of the United States

OCTOBER TERM, 1987

FREDERICK MATHEWS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

CHARLES A. ROTHFELD
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether petitioner was entitled to an entrapment instruction at his trial.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statutory provision involved	2
Statement	2
Summary of argument	8
Argument:	
Petitioner was not entitled to a jury instruction on the defense of entrapment	11
A. The evidence at trial was insufficient to raise an entrapment defense	12
B A defendant cannot both deny commission of the crime and obtain an instruction on entrapment	26
Conclusion	34

TABLE OF AUTHORITIES

Cases:

Casey v. *United States*, 276 U.S. 413 (1928)	17, 19, 23
Griffin v. *United States*, 380 U.S. 609 (1965)	30
Grimm v. *United States*, 156 U.S. 604 (1895)	17
Hampton v. *United States*, 425 U.S. 484 (1976)	15, 18
Hansford v. *United States*, 303 F.2d 219 (D.C. Cir. 1962)	29
Harris v. *New York*, 401 U.S. 222 (1971)	32
Holloway v. *United States*, 432 F.2d 775 (10th Cir. 1970)	14
Johnson v. *United States*, 426 F.2d 651 (D.C. Cir. 1970)	31
Kadis v. *United States*, 373 F.2d 370 (1st Cir. 1967)	18, 22
Lopez v. *United States*, 373 U.S. 427 (1963)	18

Cases—Continued: Page

Martin v. *Ohio*, No. 85-6461 (Feb. 25, 1987) 29, 30
Masciale v. *United States*, 356 U.S. 386 (1958) 20
Nix v. *Whiteside*, No. 84-1321 (Feb. 26, 1986) 11, 12, 31, 32
Osborn v. *United States*, 385 U.S. 323 (1966) 25
Nutter v. *United States*, 289 F. 484 (4th Cir. 1923) 28
Patterson v. *New York*, 432 U.S. 197 (1977) 29-30
People v. *Mills*, 178 N.Y. 274, 70 N.E. 786 (1904) 13
Sherman v. *United States*, 356 U.S. 369 (1958) 8, 9, 12, 13, 14-15, 18, 19, 20, 26
Simmons v. *United States*, 390 U.S. 377 (1968) 30
Sorrells v. *United States*, 287 U.S. 435 (1932) 12, 13, 15, 16, 17, 19, 27, 28, 30
Strickland v. *Washington*, 466 U.S. 668 (1984) 33
Tzimopolous v. *United States*, 554 F.2d 1216 (1st Cir.), cert. denied, 434 F.2d 851 (1977) 22
United States v. *Andrews*, 765 F.2d 1491 (11th Cir. 1985), cert. denied, No. 85-5572 (Jan. 13, 1986) 18, 20
United States v. *Anglada*, 524 F.2d 296 (2d Cir. 1975) 23
United States v. *Annese*, 631 F.2d 1041 (1st Cir. 1980) 28, 34
United States v. *Armocida*, 515 F.2d 49 (3d Cir.), cert. denied, 423 U.S. 858 (1975) 23
United States v. *Bagnell*, 679 F.2d 826 (11th Cir. 1982), cert. denied, 460 U.S. 1047 (1983) 18, 22
United States v. *Bailey*, 444 U.S. 394 (1980) 22, 32
United States v. *Becker*, 62 F.2d 1007 (2d Cir. 1933) 12, 21
United States v. *Brooks*, 567 F.2d 134 (D.C. Cir. 1977) 23
United States v. *Burkley*, 591 F.2d 903 (D.C. Cir. 1978), cert. denied, 440 U.S. 966 (1979) 9, 15, 16, 19, 20, 21
United States v. *Christopher*, 488 F.2d 849 (9th Cir. 1973) 21
United States v. *Demma*, 523 F.2d 981 (9th Cir. 1975) 29, 30, 34

Cases—Continued: Page

United States v. *DeVore*, 423 F.2d 1069 (4th Cir. 1970), cert. denied, 402 U.S. 950 (1971) 16, 18, 22
United States v. *Dion*, 762 F.2d 674 (8th Cir. 1985), rev'd, No. 85-246 (June 11, 1986) 15
United States v. *Dorta*, 783 F.2d 1179 (4th Cir. 1986), cert. denied, No. 85-1713 (June 23, 1986) 28, 32, 33
United States v. *Eberhardt*, 417 F.2d 1009 (4th Cir. 1969), cert. denied, 397 U.S. 909 (1970) 32
United States v. *Garrett*, 716 F.2d 257 (5th Cir. 1983), cert. denied, 466 U.S. 937 (1984) 33
United States v. *Goodacre*, 793 F.2d 1124 (9th Cir. 1986), cert. denied, No. 86-5704 (Dec. 1, 1986) 16, 23
United States v. *Hawkins*, No. 87-1072 (7th Cir. June 17, 1987) 23
United States v. *Henry*, 749 F.2d 203 (5th Cir. 1984) 16, 27, 29, 32, 34
United States v. *Hill*, 655 F.2d 512 (3d Cir. 1981) 28
United States v. *Humphrey*, 670 F.2d 153 (11th Cir.), cert. denied, 456 U.S. 1010 (1982) 23
United States v. *Hunt*, 749 F.2d 1078 (4th Cir. 1984), cert. denied, 472 U.S. 1018 (1985) 15, 21, 23
United States v. *Jackson*, 700 F.2d 181 (5th Cir.), cert. denied, 464 U.S. 842 (1983) 18
United States v. *Jannotti*, 673 F.2d 578 (3d Cir.), cert. denied, 457 U.S. 1106 (1982) 21-22, 24
United States v. *Kelly*, 748 F.2d 691 (D.C. Cir. 1984) 9, 16, 25
United States v. *Kutrip*, 670 F.2d 870 (8th Cir. 1982) 28
United States v. *Lambinus*, 747 F.2d 592 (10th Cir. 1984), cert. denied, 471 U.S. 1067 (1985) 24
United States v. *Liparota*, 735 F.2d 1044 (7th Cir. 1984), rev'd, 471 U.S. 419 (1985) 28
United States v. *Luce*, 726 F.2d 47 (1st Cir. 1984) 18, 21, 23
United States v. *Mayo*, 705 F.2d 62 (2d Cir. 1983) 21, 28

Cases—Continued: Page

United States v. *McLernan*, 746 F.2d 1098 (6th Cir. 1984) 18
United States v. *Mora*, 768 F.2d 1197 (10th Cir. 1985), cert. denied, No. 85-5437 (Jan. 21, 1986) 28
United States v. *Nations*, 764 F.2d 1073 (5th Cir. 1985) 16, 18, 23
United States v. *Ortiz*, 804 F.2d 1161 (10th Cir. 1986) 15, 16, 18, 21, 23
United States v. *Perl*, 584 F.2d 1316 (4th Cir. 1978), cert. denied, 439 U.S. 1130 (1979) 14
United States v. *Rhodes*, 713 F.2d 463 (9th Cir.), cert. denied, 464 U.S. 1012 (1983) 14, 21, 23
United States v. *Riley*, 363 F.2d 955 (2d Cir. 1966) 10, 20, 21, 26
United States v. *Rodgers*, 755 F.2d 533 (7th Cir. 1985), cert. denied, 473 U.S. 907 (1985) 18
United States v. *Russell*, 411 U.S. 423 (1973) 8, 12, 13, 15, 18, 21, 27, 29, 30, 32
United States v. *Sarmiento*, 786 F.2d 665 (5th Cir. 1986) 18
United States v. *Sherman*, 200 F.2d 880 (2d Cir. 1952) 20, 21
United States v. *Smith*, 757 F.2d 1161 (11th Cir. 1985) 28
United States v. *Whitley*, 734 F.2d 1129 (6th Cir. 1984) 28
United States v. *Williams*, 705 F.2d 603 (2d Cir.), cert. denied, 464 U.S. 1007 (1983) 21
United States v. *Woosley*, 761 F.2d 445 (8th Cir. 1985) 23

Statute and rule:

18 U.S.C. 201(g) 2, 5, 26
Fed. R. Civ. P. 8(e)(2) 31
Fed. R. Crim. P.:
Rule 11 30
Rule 12 30

Miscellaneous: Page

Barlow, *Entrapment and the Common Law: Is There a Place for the American Doctrine of Entrapment*, 41 Mod. L. Rev. 266 (1987) 12

Defeo, *Entrapment as a Defense to Criminal Responsibility: Its History, Theory and Application*, 1 U.S.F. L. Rev. 243 (1967) 12-13

1 W. LaFave & A. Scott, *Substantive Criminal Law* (1986) 22

Note, *Entrapment and the Denial of the Crime: A Defense of the Inconsistency Rule*, 1986 Duke L.J. 866 ..... 27, 31, 32, 33

Park, *The Entrapment Controversy*, 60 Minn. L. Rev. 163 (1976) 14, 15, 18, 19

Seidman, *The Supreme Court, Entrapment, and Our Criminal Justice Dilemma*, 1981 Sup. Ct. Rev. 111 ..... 13, 14

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-6109

FREDERICK MATHEWS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 101-108) is reported at 803 F.2d 325.

JURISDICTION

The judgment of the court of appeals was entered on October 9, 1986. A petition for rehearing was denied on October 29, 1986. The petition for a writ of certiorari was filed on December 27, 1986, and was granted on March 30, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

18 U.S.C. 201(g) provides:

> Whoever, being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him; * * *
>
> Shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Wisconsin, petitioner was convicted of accepting a gratuity as a public official, in violation of 18 U.S.C. 201(g). He was sentenced to a three-year term of probation. The court of appeals affirmed (Pet. App. 101-108).

1. The government's evidence at trial established that petitioner was responsible for administering the so-called "8A program" of the Small Business Administration (SBA) in Milwaukee, Wisconsin. That program was designed to aid small businesses owned by minorities and economically disadvantaged individuals. Under the program, the SBA would obtain government contracts and subcontract them to participating firms; it also would provide assistance to the firms in performing the contracts, and when necessary it would help participating firms obtain payment in advance of performance. Pet. App. 102; Tr. 124-125, 127-128, 130-131, 136-137. Until the time of his arrest on April 24, 1985, petitioner had primary responsibility for obtaining 8A program con-

tracts and advance payments for SBA client firms in Milwaukee, and for assisting those firms with the associated paperwork. Tr. 124-125, 127, 131, 135-137.

One of the long-term participants in the 8A program was Midwest Knitting Mills (Midwest). As early as 1979, petitioner had assisted Midwest's president, James DeShazer, in obtaining financing for his company (J.A. 116). By 1983, petitioner was Midwest's principal contact at the SBA (*id.* at 10-11). Yet beginning in 1982, petitioner repeatedly asked DeShazer for money. When DeShazer was seeking bank financing in that year, petitioner demanded a $1,200 payment to "get you a bank" (J.A. 16). DeShazer did not make that payment, but in February 1983 petitioner called DeShazer to request a $1,500 loan, which petitioner said he needed to help pay his daughter's college expenses. DeShazer made the loan, which was not repaid (*id.* at 16-18). Later that year, petitioner requested an additional $1,200 loan to help meet his mortgage payments. DeShazer again lent the money to petitioner, and again was not repaid (*id.* at 18-19).[1]

In February 1984, petitioner and DeShazer met to discuss Midwest's failure to receive advance payments from the SBA that were necessary for the performance of its contracts. At that meeting, petitioner asked DeShazer for a $3,000 personal loan (J.A. 12-15). Although DeShazer refused to make the payment at that time, petitioner repeated his request for the money on several occasions between February

---

[1] DeShazer also lent petitioner an additional $200 in 1983 (J.A. 20). The existence of all of these loans was confirmed by a 1984 letter from DeShazer to petitioner requesting repayment (GX 13). After DeShazer sent this letter, petitioner made one repayment in the amount of $200 (J.A. 50-51).

and July of 1984 (*id.* at 20, 85, 94). During that same period, DeShazer noted that petitioner had failed to process his requests for payment on Midwest's 8A contracts (*id.* at 27). In October 1984, DeShazer complained to representatives of the Defense Department, one of his customers, that he believed he was being denied advance payments because he would not make payoffs to petitioner (*id.* at 23-24). The Defense Department in turn reported this allegation to the Federal Bureau of Investigation (FBI), which in early 1985 asked DeShazer to assist an investigation by recording his conversations with petitioner. DeShazer agreed. *Id.* at 25-27.

DeShazer and petitioner met in February 1985 (J.A. 29). At that meeting, DeShazer offered petitioner the $4,200 he had previously requested if petitioner would agree to process Midwest's application for advance payments.[2] DeShazer told petitioner that he "want[ed] to give you that forty-two hundred dollars, if you can assure me that this is going to solve my problems." Petitioner responded: "sure, I am sure that I can do that," adding that the payment would "solve the problem." J.A. 30-31. In the following weeks, petitioner and DeShazer spoke many times about Midwest's financial problems (*id.* at 32). The two met again on April 8 in DeShazer's car. After a discussion of DeShazer's prospects for obtaining financing for his company, petitioner asked, "what can you do for me?" (see *id.* at 125; Tr. 508). Petitioner then referred to DeShazer's statement in February of that year that he had recently come into a large sum of money. DeShazer responded that he

---

[2] The $4,200 represented the $1,200 petitioner had requested in 1982 and the $3,000 he had requested in February 1984.

would pay petitioner in two installments of $2,100 each.[3] And DeShazer again explained to petitioner "the critical situation that I was in, * * * I kept saying, are you going to, can you tell me once I do this, this nightmare that I have is over? And he told me that it would be." *Id.* at 38-39.

Petitioner and DeShazer spoke by telephone on April 23, 1985, and agreed that DeShazer would make a $2,100 payment the next day (J.A. 41-42).[4] After an exchange of calls the following morning, they agreed to meet in a hotel restaurant (*id.* at 99-101). At the hotel, petitioner asked for the money; after obtaining petitioner's assurances that the payment would end Midwest's financial problems, DeShazer passed the money under the table (*id.* at 47-49). Petitioner was arrested as he left the hotel.

2. At the outset of trial, the district court ruled that petitioner would not be permitted to argue entrapment as a defense. The court explained that a defendant is entitled to argue entrapment only if he "concede[s] that what he did was wrong" (J.A. 3). Because petitioner denied accepting the payment from DeShazer for the performance of his official duties—and thus denied having the requisite mental state for a violation of 18 U.S.C. 201(g)—the court ruled that petitioner could not rely on the defense of entrap-

[3] The tape recording of this conversation—in which petitioner asked, "so, what can you do for me, man?"—was played for the jury and was admitted into evidence as Government Exhibit 1.

[4] In this conversation, DeShazer asked if petitioner was still interested in the payment; petitioner responded, "I'm just waiting for your lead." The tape recording of this conversation, which was played for the jury, was admitted into evidence as Government Exhibit 2.

ment (*id.* at 3-4). The court did, however, permit petitioner "to proceed with the theory, at least, that the acts of the [petitioner] were procured by the overt acts of this princip[al] witness of the Government, Mr. DeShazer, and to develop[] that as part of [his] first line of defense" at trial (*id.* at 131).

Petitioner subsequently testified at trial. While he disputed some of the particulars of the government's case,[5] he acknowledged that he had borrowed money from DeShazer in 1983 (J.A. 119). He also acknowledged that he had accepted DeShazer's offer of a loan in February 1985 (*id.* at 122); that whenever the subject was broached subsequently he had indicated that he was "[still] interested in" the loan (*id.* at 123, 125); and that he had brought up the topic of DeShazer's offer at their April 8 meeting, stating that "he would still be willing to accept" the money (*id.* at 125; see *id.* at 123; Tr. 508-509). Petitioner also acknowledged that his discussions with DeShazer about the payment generally followed talk about Midwest's financial problems. J.A. 124-125, 127; Tr. 508. And petitioner conceded that he took $2,100 from DeShazer in an under-the-table payment on April 24, 1985, while telling DeShazer not to mention the payment to anyone (J.A. 126-127, 129). Petitioner contended, however, that he had viewed the loan as a personal one that was not connected to the performance of his job (*id.* at 127-130). He attributed the two-month delay between the original offer of the

[5] Petitioner asserted that he had asked for and borrowed money from DeShazer only once prior to April 1985 and that he had partially repaid that loan (J.A. 119). He also testified that as of January 1984 he did not have full responsibility for the 8A program (*id.* at 120), and that he had in fact fully processed Midwest's request for advance payment (*id.* at 124).

loan and the delivery of the money to his doubts that DeShazer actually had the money or was "really sincere about the loan" (*id.* at 126; see *id.* at 122, 123, 125, 126).

At the close of the evidence, the district court declined to give an entrapment instruction. Petitioner argued that the court's ruling on that issue was a ground for a mistrial. The government opposed this motion for two reasons, arguing (1) that a defendant may not both deny commission of the offense and argue entrapment, and (2) that petitioner had not, in any event, adduced sufficient evidence of entrapment to warrant an instruction on the issue (Tr. 622). The district court found it unnecessary to address the government's second argument. Instead, the court ruled that petitioner was not entitled to an entrapment instruction because he "elected * * * to deny the intent and the other elements in the [offense]" (J.A. 131). The court went on to note, however, that the evidence of entrapment was "shaky at best," adding that "it would normally require more evidence than what is presently in the record on which to predicate an entrapment instruction" (*ibid.*). The jury returned a verdict of guilty.

3. The court of appeals affirmed, holding that petitioner was not entitled to raise an entrapment defense (Pet. App. 101-108).[6] The court explained that

---

[6] At points, petitioner appeared to base his challenge in the court of appeals on the district court's initial ruling that he would not be permitted to argue entrapment. See Pet. C.A. Br. 14. Petitioner did not point to any evidence bearing on the entrapment issue that he believed to have been erroneously excluded as a consequence of this ruling, however, and it appears that his real challenge was to the district court's refusal to instruct the jury on entrapment at the close of the case. See *id.* at 20, 23; Pet. C.A. Reply Br. 3-4.

Seventh Circuit precedent "requir[es] a defendant to admit all elements of the crime before being allowed to plead entrapment" (*id.* at 103). In the court of appeals' view, "[w]hen a defendant pleads entrapment, he is asserting that, although he had criminal intent, it was 'the Government's deception [that implanted] the criminal design in the mind of the defendant'" (*ibid.* (quoting *United States* v. *Russell*, 411 U.S. 423, 436 (1973)). The court found "this to be inconsistent *per se* with the defense that the defendant never had the requisite criminal intent"; the court thus saw "no reason to allow [petitioner] or any defendant to plead these defenses simultaneously" (Pet. App. 103).[7]

SUMMARY OF ARGUMENT

A. The affirmative defense of entrapment may be invoked when "the Government plays on the weaknesses of an innocent party and beguiles him into committing crimes which he otherwise would not have attempted." *Sherman* v. *United States*, 356 U.S. 369, 376 (1958). As this definition suggests, the entrapment doctrine is designed to protect "innocent" persons—those who lack a predisposition to commit crime—from overbearing police tactics that are likely to induce criminal behavior on the part of otherwise law-abiding citizens. The entrapment defense thus has two components: the crime must have been induced by the government, and the defendant must not have been predisposed.

---

[7] The court of appeals also rejected petitioner's argument that the government had exercised its peremptory challenges in a discriminatory way in striking prospective jurors (Pet. App. 105-108). This Court denied certiorari on petitioner's challenge to that aspect of the decision below.

The courts have uniformly held that the government may be said to have induced an offense only if the police behavior was such that it would likely have overborne "a law-abiding citizen's will to obey the law." *United States* v. *Kelly*, 748 F.2d 691, 698 (D.C. Cir. 1984). Simple solicitation or initiation of the crime by the government plainly does not fall within this category, since " 'solicitation by itself is not the kind of conduct that would persuade an otherwise innocent person to commit a crime' " *United States* v. *Burkley*, 591 F.2d 903, 912 (D.C. Cir. 1978) (citation omitted), cert. denied, 440 U.S 966 (1979). Instead, as this Court's holdings suggest, inducement can be made out only if the government used coercion or some other sort overbearing conduct to instigate the offense. Conversely, a defendant who is predisposed—whose "criminal conduct was due to his own readiness and not to the persuasion of government agents" (*Sherman*, 356 U.S. at 376-377)—cannot claim entrapment. And obviously, the surest indication of this sort of predisposition is the defendant's unhesitating acceptance of the government's criminal offer.

Because entrapment is an affirmative defense, it need not be submitted to the jury unless the defendant makes a threshold showing of inducement and lack of predisposition. Petitioner plainly failed to make such a showing in this case. The "inducement" here was a simple criminal proposition: the government's agent offered petitioner cash in return for official action. This is hardly the sort of conduct that would have overborne the will of a normally law-abiding person. At the same time, absolutely nothing in petitioner's reaction to the proposal suggests that he was not predisposed. To the contrary, petitioner's

eager acceptance of the offer made it clear beyond dispute, in Judge Friendly's words, that "the accused was 'ready and willing without persuasion' " to commit the offense. *United States* v. *Riley*, 363 F.2d 955, 957 (2d Cir. 1966). Because the evidence at trial thus was insufficient to raise either element of the defense, the courts below were correct in holding that petitioner was not entitled to a jury instruction on entrapment.

B. Petitioner was not entitled to an entrapment instruction for a second, independent reason: his express denial of the crime was inconsistent with his simultaneous claim that he was entrapped into committing it. The court below, like a majority of the courts of appeals, will not permit a defendant both to testify that he did not commit the crime, and at the same time to argue that the government entrapped him. This "inconsistency rule" is a sound one.

Entrapment is a nonconstitutional affirmative defense that relieves the defendant of liability for what otherwise would be a crime. Because the law of entrapment is not governed by any constitutional principle, and because Congress has not enacted legislation affecting the defense in any way, the administration of the entrapment defense has remained principally the responsibility of the courts. The courts, in turn, have applied the defense in a way that is consistent with its underlying purposes and that furthers accuracy in the truth-seeking process. Applying their authority to shape the entrapment defense according to these principles, a great majority of the courts of appeals have concluded that withholding the defense from defendants who testify that they did not commit the crime accords most fully

with the "nature of a criminal trial as a search for truth." *Nix* v. *Whiteside*, No. 84-1321 (Feb. 26, 1986), slip op. 8.

When the defendant denies an element of the offense, he effectively testifies that he was not entrapped; if he nevertheless is permitted to argue entrapment, he will ask the jury to acquit him on a view of the facts that he himself has testified is not true. But a defendant, who has no right to present false testimony, may fairly be held to the story that he tells under oath. And if the defendant is expected to tell the truth when he testifies, there is no justification for permitting him to seek a windfall acquittal on grounds that are inconsistent with his stated view of the facts. In this case, because petitioner testified that he did not commit the crime, he was not entitled to an entrapment instruction.

ARGUMENT

PETITIONER WAS NOT ENTITLED TO A JURY INSTRUCTION ON THE DEFENSE OF ENTRAPMENT

The government's evidence at trial revealed that an informant, DeShazer, made a simple criminal proposal to which petitioner readily acquiesced. Testifying on his own behalf, petitioner acknowledged that he unhesitatingly accepted DeShazer's offer of money; he maintained, however, that he took the payment as a personal loan, rather than as recompense for official services. On this record, two independent reasons supported the decisions of the courts below to deny petitioner an entrapment instruction. An informant's simple offer of a criminal proposition is not the sort of government action that has ever been understood to amount to entrapment. Because petitioner could point to no more than that in this case,

he failed to make the threshold showing necessary to justify an instruction on the affirmative defense. At the same time, petitioner's attempt both to deny the crime and to argue that the government entrapped him into committing it—in effect, stating that "I didn't do it, and anyway the government made me do it"—is inconsistent with this Court's admonition that a criminal trial is ultimately "a search for truth." *Nix* v. *Whiteside*, No. 84-1321 (Feb. 26, 1986), slip op. 8.

A. The Evidence At Trial Was Insufficient To Raise an Entrapment Defense

1. The affirmative defense of entrapment may be invoked "when the Government plays on the weaknesses of an innocent party and beguiles him into committing crimes which he otherwise would not have attempted." *Sherman* v. *United States*, 356 U.S. 369, 376 (1958). See *Sorrells* v. *United States*, 287 U.S. 435, 446-448 (1932). The doctrine, as Judge Learned Hand explained more than 50 years ago, "derives from a spontaneous moral revulsion against using the powers of government to beguile innocent, though ductile, persons into lapses which they might otherwise resist." *United States* v. *Becker*, 62 F.2d 1007, 1009 (2d Cir. 1933). But because the doctrine was created as a "spontaneous" response to particular prosecutions—and, perhaps, because the entrapment defense is not grounded in the Constitution,[8] in the common law,[9] or in any explicit state-

[8] See *United States* v. *Russell*, 411 U.S. 423, 433 (1973).

[9] Entrapment is not recognized as a defense in England (see Barlow, *Entrapment and the Common Law: Is There a Place for the American Doctrine of Entrapment*, 41 Mod. L. Rev. 266 (1978); Defeo, *Entrapment as a Defense to Criminal*

ment by Congress[10]—the Court has never expressly articulated either its purposes or its boundaries. See Seidman, *The Supreme Court, Entrapment, and Our Criminal Justice Dilemma*, 1981 Sup Ct. Rev. 111, 127.

It nevertheless is clear from the Court's treatment of entrapment claims that two considerations underlie the entrapment doctrine. First, the Court has concluded that defendants who are induced to commit crimes by overbearing government conduct—defendants repeatedly described by the Court as "unwary innocents" (*Sherman*, 356 U.S. at 372)[11] who lack a preexisting "disposition to commit the alleged offense" (*Sorrells*, 287 U.S. at 442)—are in some sense less culpable than other persons who engage in criminal conduct. Second, the Court has viewed as undesirable those police tactics that are likely to induce criminal behavior on the part of otherwise law-abiding persons. Such tactics are offensive because they can lead to criminal activity by (and the imposi-

---

Responsibility: Its History, Theory and Application, 1 U.S.F. L. Rev. 243, 247 (1967)), and was rejected by American courts in the nineteenth and early twentieth centuries (see, *e.g.*, *People* v. *Mills*, 178 N.Y. 274, 70 N.E. 786 (1904)).

[10] A majority of the Court has found the entrapment defense implicit in criminal statutes, reasoning that it could not have been "the intention of the Congress in enacting [a given] statute that its processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them." *Sorrells*, 287 U.S. at 446-448. See *Sherman*, 356 U.S. at 372.

[11] See also *United States* v. *Russell*, 411 U.S. at 434-435; *Sherman*, 356 U.S. at 376; *Sorrells*, 287 U.S. at 442, 446-448.

tion of criminal sanctions against) persons who, if left to their own devices, might not have violated the law. See Park, *The Entrapment Controversy*, 60 Minn. L. Rev. 163, 244 (1976).

As the Court has recognized, neither of these considerations, standing alone, is sufficient to defeat a prosecution, and neither is fully served by the entrapment doctrine in its current form.[12] When both considerations are present in a single case, however—when the defendant is an "unwary innocent" and the police tactics that induce the crime are overbearing—the Court has concluded that the defense may be invoked. In a case where coercive government tactics are directed against persons lacking the predisposition to commit a crime, the Court has reasoned, the resulting "criminal conduct [is] 'the product of the *creative* activity' of law enforcement officials," and therefore should not be punished. *Sherman*, 356 U.S.

---

[12] On the one hand, persons who are induced to commit criminal acts by third parties are not ordinarily regarded as nonculpable: a person led into criminal conduct by a private actor rather than by a government agent may not claim entrapment, or for that matter argue that his conduct is "less criminal" because it was induced by another. *Sherman*, 356 U.S. at 380 (Frankfurter, J., concurring in the result). See *United States* v. *Rhodes*, 713 F.2d 463, 467 (9th Cir.), cert. denied, 464 U.S. 1012 (1983); *United States* v. *Perl*, 584 F.2d 1316, 1320-1321 (4th Cir. 1978), cert. denied, 439 U.S. 1130 (1979); *Holloway* v. *United States*, 432 F.2d 775, 776 (10th Cir. 1970). On the other hand, it is impossible to determine in any given case whether a defendant would have remained law-abiding had it not been for the government inducement, since "the very fact that an entrapped defendant accepts an inducement conclusively proves that he poses a risk of committing the offense whenever a similar inducement might be offered in the future." Seidman, *supra*, 1981 Sup. Ct. Rev. at 141.

at 372 (quoting *Sorrells*, 287 U.S. at 451) (emphasis added in *Sherman*). See *United States* v. *Russell*, 411 U.S. at 435-436. See generally Park, *supra*, 60 Minn. L. Rev. at 240-242. The Court's application of the entrapment doctrine, in Judge McGowan's words, has thus been directed at "protecting the otherwise unpredisposed defendant" from police tactics calculated to lead law-abiding persons into crime. *United States* v. *Burkley*, 591 F.2d 903, 912 (D.C. Cir. 1978), cert. denied, 440 U.S 966 (1979)[13]

2. The policies served by the entrapment doctrine dictate the two elements that must be present to make out an entrapment claim: government inducement and a lack of predisposition to engage in the criminal conduct. These elements are, of course, closely related. The nature of a defendant's response to an inducement—his readiness to commit the crime at the government's invitation—obviously bears on whether he is predisposed, rather than an undisposed "innocent." The nature of the inducement, in turn, may help dictate the defendant's response. See *United States* v. *Hunt*, 749 F.2d 1078, 1085 n.9 (4th Cir. 1984), cert. denied, 472 U.S. 1018 (1985);

---

[13] The Court has made it clear that "the principal element in the defense of entrapment" is "the defendants's predisposition to commit the crime" (*Russell*, 411 U.S. at 433). Indeed, a finding that the defendant was predisposed is fatal to an entrapment defense. See *id.* at 436; *Hampton* v. *United States*, 425 U.S. 484, 488-489 (1976) (plurality opinion); *id.* at 492 n.2 (Powell, J., concurring in the judgment). See generally *United States* v. *Ortiz*, 804 F.2d 1161, 1165 (10th Cir. 1986); *United States* v. *Dion*, 762 F.2d 674, 684 (8th Cir. 1985), rev'd on other grounds, No. 85-246 (June 11, 1986); *United States* v. *Hunt*, 749 F.2d 1078, 1085 (4th Cir. 1984), cert. denied, 472 U.S. 1018 (1985).

United States v. *Nations*, 764 F.2d 1073, 1079 (5th Cir. 1985). Both elements therefore are ultimately concerned with the single question whether the government "implant[ed] in the mind of an innocent person the disposition to commit the alleged offense" (*Sorrells*, 287 U.S. at 442). Yet because inducement focuses on the government's conduct, while predisposition is concerned with the defendant's state of mind, it is convenient to consider the two elements separately.

a. The courts have uniformly held that the government may be said to have induced an offense only if the "behavior [of law enforcement agents] was such that a law-abiding citizen's will to obey the law could have been overborne" (*United States* v. *Kelly*, 748 F.2d 691, 698 (D.C. Cir. 1984))—if, in other words, there was "government conduct that would create a risk of causing an otherwise unpredisposed person to commit the crime charged" (*Burkley*, 591 F.2d at 914).[14] Thus, again in Judge McGowan's words, "mere government solicitation or initiation [of the crime] is, without more, insufficient to raise the entrapment defense"; that conclusion "rests on the not unreasonable behavioral assumption that 'solicitation by itself is not the kind of conduct that would persuade an otherwise innocent person to commit a crime'" (*id.* at 911-912 (quoting *United States* v. *DeVore*, 423 F.2d 1069, 1071 (4th Cir. 1970), cert. denied, 402 U.S. 950 (1971)).

---

[14] See, *e.g.*, *United States* v. *Hawkins*, No. 87-1072 (7th Cir. June 17, 1987), slip op. 9; *United States* v. *Ortiz*, 804 F.2d 1161, 1165 (10th Cir. 1986); *United States* v. *Nations*, 764 F.2d at 1079; *United States* v. *Henry*, 749 F.2d 203, 207 n.5 (5th Cir. 1984) (en banc).

The validity of this conclusion is confirmed by this Court's holdings. In its earliest consideration of the issue, the Court rejected assertions of the entrapment defense when the defendant "was in no way induced to commit the crime beyond the simple request of [a government informant]." *Casey* v. *United States*, 276 U.S. 413, 419 (1928). See *Grimm* v. *United States*, 156 U.S. 604, 609-610 (1895).[15] And in its first lengthy treatment of entrapment, the Court made it clear that "the defense of entrapment is not simply that the particular act was committed at the instance of government officials" (*Sorrells*, 287 U.S. at 451). To the contrary, the Court pronounced it "well settled that the fact that officers or employees of the Government merely afforded opportunities or facilities for the commission of the offense does not defeat the prosecution" (*id.* at 441). "Artifice and strategem," the Court explained, are "frequently es-

---

[15] In *Casey*, the defendant provided morphine at the request of a government informant (see 276 U.S. at 422 (Brandeis, J., dissenting)). Although the defendant failed to make an entrapment argument, the Court specifically suggested that such a defense would be unavailable, explaining that the defendant "was in no way induced to commit the crime beyond the simple request of [the informant] to which he seems to have acceded without hesitation and as a matter of course" (*id.* at 419). The government's initiation of the transaction, the Court added, was no different in substance from an agent's "ordering a drink [from] a suspect bootlegger" (*ibid.*). In *Grimm*, a government official solicited information about obscene materials through the mails; the defendant was prosecuted when he responded to this solicitation. The Court rejected the defendant's challenge to the prosecution—even though the illegal material was "deposited in the mails at the instance of the government"—because the government's action had been taken "to ascertain whether the defendant was engaged in an unlawful business" (156 U.S. at 609-610).

sential to the enforcement of the law" (*ibid.*). See *Russell*, 411 U.S. at 435-436; *Sherman*, 356 U.S. at 372; cf. *Lopez* v. *United States*, 373 U.S. 427, 436 (1963).[16] In the succeeding years, the courts of appeals have uniformly agreed that an entrapment defense cannot be raised when a government agent does no more than initiate the criminal transaction by offering the defendant money, soliciting contraband, or proposing the crime, since such conduct "merely afford[s] [the defendant] with the opportunity to commit an offense he was not otherwise unready to commit." *United States* v. *Luce*, 726 F.2d 47, 49 (1st Cir. 1984).[17]

Instead, the courts have held that inducement can be established only by a showing of at least " 'persuasion or mild coercion' and 'pleas based on need, sympathy, or friendship' " (*United States* v. *Nations*, 764 F.2d at 1080 (citations omitted)).[18] Again, this

---

[16] The Court has recognized that the use of undercover techniques is essential in combatting narcotics offenses and consensual crimes. See *Russell*, 411 U.S. at 432; *Hampton* v. *United States*, 425 U.S. 484, 495 n.7 (1976) (Powell, J., concurring in the result); Park, *supra*, 60 Minn. L. Rev. at 164.

[17] See, *e.g.*, *DeVore*, 423 F.2d at 1071; *United States* v. *Sarmiento*, 786 F.2d 665, 667 (5th Cir. 1986); *United States* v. *Rodgers*, 755 F.2d 533, 550 (7th Cir. 1985), cert. denied, 473 U.S. 907 (1985); *United States* v. *Ortiz*, 804 F.2d 1161, 1165 (10th Cir. 1986); *United States* v. *Andrews*, 765 F.2d 1491, 1499 (11th Cir. 1985), cert. denied, No. 85-5572 (Jan. 13, 1986).

[18] See, *e.g.*, *Kadis* v. *United States*, 373 F.2d 370, 374 (1st Cir. 1967); *DeVore*, 423 F.2d at 1071; *United States* v. *Jackson*, 700 F.2d 181, 191 (5th Cir.), cert. denied, 464 U.S. 842 (1983); *United States* v. *McLernan*, 746 F.2d 1098, 1113-1114 (6th Cir. 1984); *United States* v. *Bagnell*, 679 F.2d 826, 835 (11th Cir. 1982), cert. denied, 460 U.S. 1047 (1983). See

Court's holdings are illustrative. In finding an entrapment defense available in *Sorrells*, a prosecution for a violation of the National Prohibition Act (see 287 U.S. at 438), the Court noted that an undercover agent had made repeated requests for liquor despite the defendant's obvious reluctance to supply it (*id.* at 439-440); the Court found it crucial that the defendant's ultimate decision to provide the liquor was "instigated by the prohibition agent * * * by repeated and persistent solicitation in which [the agent] succeeded by taking advantage of the sentiment aroused by reminiscences of their experiences as companions in arms in the World War" (*id.* at 441). Similarly, the Court held that entrapment was established in *Sherman*, where a reluctant defendant provided narcotics to an informant only after repeated requests "predicated on [the informant's] presumed suffering" (356 U.S. at 371; see *id.* at 373). In contrast, the Court found no inducement where the defendant responded to an informant's "simple request" for narcotics. *Casey*, 276 U.S. at 419.[19]

---

generally Park, *supra*, 60 Minn. L. Rev. at 180-183. Citing a circuit jury instruction, Judge McGowan suggested that inducement includes " 'persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward, or pleas based on need, sympathy, or friendship. A solicitation, request or approach by law enforcement officials to engage in criminal activity, standing alone, is not an inducement.' " *Burkley*, 591 F.2d at 913 & n.18. It is clear, however, that " 'promises of reward' " do not include simple offers of gain through participation in an illegal activity, since law enforcement officers " 'may properly offer to give to the defendant money which is involved in the commission of the crime itself' " (*ibid.*). See *id.* at 914.

[19] The only court to take a different approach is the Second Circuit, which has defined inducement to include "soliciting,

b. Whatever the inducement offered by the government, a defendant is not entrapped when his "criminal conduct was due to his own readiness and not to the persuasion of government agents" (*Sherman*, 356 U.S. at 376-377)—when, that is, the defendant was predisposed to engage in the criminal activity. The Court has treated such persons, who "needed no persuasion" to commit the crime (*Masciale* v. *United States*, 356 U.S. 386, 388 n.3 (1958)), as fully culpable. In part, of course, this predisposition inquiry is the flip side of the inducement question, since a defendant may suggest the absence of predisposition "by demonstrating that he had not favorably received the government plan, and the government had to 'push it' on him, or that * * * on at least one occasion he had directly refused to participate" (*United States* v. *Andrews*, 765 F.2d 1491, 1499 (11th Cir. 1985), cert. denied, No. 85-5572 (Jan. 13, 1986)). But the existence of predisposition does not hinge solely on the objective nature of the government's action: it turns on whether the defendant was "*ready and willing* to commit the crime"

---

proposing, initiating, broaching or suggesting the commission of the offense charged." *United States* v. *Sherman*, 200 F.2d 880, 883 (2d Cir. 1952). At the same time, however, the Second Circuit has held that "even when inducement [is] shown, submission [of the entrapment question] to the jury is not required if uncontradicted proof has established that the accused was 'ready and willing without persuasion' and to have been 'awaiting any propitious opportunity to commit the offense.'" *United States* v. *Riley*, 363 F.2d 955, 958-959 (2d Cir. 1966). As Judge McGowan has noted, "[t]he practical effect of *Riley* is to require something more than government solicitation or initiation, but to do so in terms of predisposition rather than in terms of inducement" (*Burkley*, 591 F.2d at 913).

when it was proposed (*Burkley*, 591 F.2d at 916 (emphasis in original)). Cf. *Russell*, 411 U.S. at 433.

Obviously, the surest indication of this sort of predisposition is the defendant's unhesitating acceptance of the government's criminal offer—or, as Judge Learned Hand described it, the defendant's " 'willingness to [commit the offense], as evinced by ready complaisance' " (*United States* v. *Sherman*, 200 F.2d 880, 882 (2d Cir. 1952) (quoting *Becker*, 62 F.2d at 1008)). See *United States* v. *Riley*, 363 F.2d 955, 959 (2d Cir. 1966) (Friendly, J.) (predisposition present when "the accused was 'ready and willing without persuasion' and [was] 'awaiting any propitious opportunity to commit the offense' ").[20] In such a case, the defendant's ready acceptance of a criminal offer makes it clear that he was "of a frame of mind such that once his attention [was] called to the criminal opportunity, his decision to commit the crime [was] the product of his own preference and not the product of government persuasion" (*United States* v. *Williams*, 705 F.2d 603, 618 (2d Cir.), cert. denied, 464 U.S. 1007 (1983)). Thus, to take just one example, "the very acceptance of a bribe by a public official may be evidence of a predisposition to do so whenever the opportunity is presented" (*United States* v. *Jannotti*, 673 F.2d 578,

---

[20] Accord *United States* v. *Luce*, 726 F.2d 47, 49 (1st Cir. 1984); *United States* v. *Mayo*, 705 F.2d 62, 69 (2d Cir. 1983); *United States* v. *Hunt*, 749 F.2d 1078, 1085 (4th Cir. 1984), cert. denied, 472 U.S. 1018 (1985); *United States* v. *Christopher*, 488 F.2d 849, 850 (9th Cir. 1973); *United States* v. *Rhodes*, 713 F.2d 463, 467 (9th Cir.), cert. denied, 464 U.S. 1012 (1983); *United States* v. *Ortiz*, 804 F.2d 1161, 1166 (10th Cir. 1986); *Burkley*, 591 F.2d at 916.

604 (3d Cir.) (en banc), cert. denied, 457 U.S. 1106 (1982)). See *Tzimopolous* v. *United States*, 554 F.2d 1216, 1217 (1st Cir.), cert. denied, 434 F.2d 851 (1977).

3. Affirmative defenses such as entrapment need not be submitted to the jury unless "the testimony given or proffered meets a minimum standard as to each element of the offense." *United States* v. *Bailey*, 444 U.S. 394, 415 (1980); see *id.* at 416. Indeed, while the Court has never had occasion to apply this rule directly in an entrapment case, it has found it obvious that an inadequate showing by the defendant "might well * * * justif[y] a refusal to instruct the jury at all on entrapment" (*Lopez*, 373 U.S. at 436 (footnote omitted)). The courts of appeals therefore have held without exception that the defendant is not entitled to an entrapment instruction unless he "come[s] forward with evidence 'that the government's conduct created a substantial risk that the offense would be committed by a person other than one ready to commit it.'" *United States* v. *Bagnell*, 679 F.2d 826, 834 (11th Cir. 1982), cert. denied, 460 U.S. 1047 (1983) (citation omitted).[21]

---

[21] Most courts have held that the defendant has the burden of producing evidence on inducement, which, when satisfied, obligates the government to prove predisposition. See 1 W. LaFave & A. Scott, *Substantive Criminal Law* § 5.2(4) (1986). Other courts, however, have collapsed the inqury, holding that inducement and predisposition are ultimately concerned with the single question whether the defendant was prepared to commit the crime in the absence of the government conduct. See, *e.g.*, *Kadis* v. *United States*, 373 F.2d 370, 373-374 (1st Cir. 1967); *United States* v. *Devore*, 423 F.2d 1069, 1071 (4th Cir. 1970), cert. denied, 402 U.S. 950 (1971). But this distinction in approach is, to a large degree, semantic: because the concepts of inducement and predisposition are so

And given the nature of the entrapment defense, it is not surprising that the courts have required a showing of "inducement by a government agent *and* a lack of predisposition by the defendant" before submitting an entrapment claim to the jury. *United States* v. *Rhodes*, 713 F.2d 463, 467 (9th Cir.) (emphasis in original), cert. denied, 466 U.S. 1012 (1983).[22]

4. In this case, petitioner plainly failed to make the threshold showing of either inducement or lack of predisposition that would have justified submitting the entrapment issue to the jury. Even viewing the evidence in the light most favorable to petitioner, it is evident that the "inducement" in this case was a simple criminal proposition: the government's agent, DeShazer, offered petitioner cash in return for official action. As the Court put it in *Casey*, petitioner "was in no way induced to commit the crime beyond the

---

closely related, every court requires some evidence that an innocent and reluctant defendant was corrupted by the government before sending the entrapment issue to the jury.

[22] See, *e.g.*, *United States* v. *Luce*, 726 F.2d 47, 49 (1st Cir. 1984); *United States* v. *Anglada*, 524 F.2d 296, 298 (2d Cir. 1975); *United States* v. *Armocida*, 515 F.2d 49, 55 (3d Cir.), cert. denied, 423 U.S. 858 (1975); *United States* v. *Hunt*, 749 F.2d 1078, 1085 (4th Cir. 1984), cert. denied, 472 U.S. 1018 (1985); *United States* v. *Nations*, 764 F.2d 1073, 1079 (5th Cir. 1985); *United States* v. *Hawkins*, No. 87-1072 (7th Cir. June 17, 1987), slip op. 8-10; *United States* v. *Woosley*, 761 F.2d 445, 448 (8th Cir. 1985); *United States* v. *Goodacre*, 793 F.2d 1124, 1125-1126 (9th Cir. 1986), cert. denied, No. 86-5704 (Dec. 1, 1986); *United States* v. *Ortiz*, 804 F.2d 1161, 1165 (10th Cir. 1986); *United States* v. *Humphrey*, 670 F.2d 153, 155 (11th Cir.), cert. denied, 456 U.S. 1010 (1982); *United States* v. *Brooks*, 567 F.2d 134, 138 (D.C. Cir. 1977); *id.* at 142 (Robinson, J., dissenting).

simple request of [the agent] to which he seems to have acceded without hesitation and as a matter of course" (276 U.S. at 419).[23] While the transaction was not consummated immediately because of petitioner's doubts that DeShazer actually had the money, in none of their subsequent conversations did DeShazer do more than restate his willingness to make the payment, a proposal to which petitioner readily agreed; indeed, petitioner acknowledged that at the April 8, 1985, meeting, he was the one who brought up the subject of the payment.

Petitioner argued in the court of appeals that "DeShazer did more than merely provide the opportunity; he persuaded, begged, and encouraged [petitioner] to take [the money]" (Pet. C.A. Reply Br. 3; see Pet. C.A. Br. 2). This contention is entirely unsupported by the record. While DeShazer made several offers, petitioner's own testimony indicates that he unhesitatingly accepted each one (see J.A. 122, 123, 125, 127). DeShazer at no point "persuaded" or "begged" petitioner to do anything. Indeed, since petitioner contended at trial that he intended only to borrow the money because he was "financially strapped"

---

[23] It is doubtful that a simple offer of money in any amount can qualify as an inducement of a sort sufficient to constitute entrapment; law-abiding persons are expected to resist temptation when unaccompanied by coercion or other kinds of pressure. But it is clear, in any event, that the offer of $4,200 to a defendant making an annual salary of $38,000 (see Tr. 491) did not impose undue pressure, particularly where, as here, the amount was simply the sum that the defendant himself had previously solicited. Cf. *United States* v. *Lambinus*, 747 F.2d 592, 598 (10th Cir. 1984), cert. denied, 471 U.S. 1067 (1985); *United States* v. *Jannotti*, 673 F.2d 578, 599 (3d Cir.) (en banc), cert. denied, 457 U.S. 1106 (1982).

(J.A. 123), it would have been nonsensical for him to have suggested that petitioner begged him to take a loan. And the only "encouragement" offered by DeShazer was the suggestion that he might spend the money himself if he did not give it to petitioner (see *id.* at 69). That is hardly an "inducement" within the meaning of this Court's decisions: placing a time limit on a criminal proposition is not the sort of government action that would induce a normally law-abiding citizen to engage in criminal conduct.[24]

In this case, then, the government did not make use of coercion, threats, pleas based on need or sympathy, or, for that matter, even simple persuasion. The transaction here consisted of an offer and an acceptance. In these circumstances, the government's action plainly was not "such that a law-abiding citizen's will to obey the law could have been overborne" (*Kelly*, 748 F.2d at 698). "At the most," DeShazer's proposal "afforded the petitioner 'opportunities or facilities' for the commission of a criminal offense, and that is a far cry from entrapment." *Osborn* v. *United States*, 385 U.S. 323, 331-332 (1966).

At the same time, petitioner failed to create any doubt whatsoever about his predisposition to commit the crime. Even leaving aside petitioner's previous requests for loans and his conceded acceptance of

---

[24] Petitioner also contended in the court of appeals (Pet. C.A. Reply Br. 3) that DeShazer urged him "to take the excess money so that DeShazer would not get into trouble with his wife." In fact, however, DeShazer indicated (according to petitioner's trial testimony (see J.A. 122)) only that he kept the money from which the payment would be made in his garage because "he didn't want his wife to know about the total amount." Not surprisingly, DeShazer did not make the incredible statement that he would get into trouble with his wife unless petitioner took a payoff.

money from DeShazer in 1983, petitioner at no point disputed DeShazer's testimony that he accepted the first and every subsequent offer of a payoff without hesitation. To the contrary, petitioner acknowledged that he expressed interest whenever DeShazer raised the possibility of a payment, and he conceded that he himself made an unsolicited inquiry about the payment on April 8, 1985. Petitioner contended only that he did not have an improper motive in taking the money—a contention that was necessarily rejected by the jury. " '[U]ncontradicted evidence' " thus "established that the accused was 'ready and willing without persuasion' " to commit the offense (*Riley*, 363 F.2d at 958). A person who jumps at a criminal opportunity in that way can hardly be characterized as an "unwary innocent" (*Sherman*, 356 U.S. at 372).

For these reasons, the evidence at trial was not sufficient to raise either element of the defense of entrapment. The district court was therefore correct in refusing petitioner's request to instruct the jury on that defense.

B. A Defendant Cannot Both Deny Commission Of The Crime And Obtain An Instruction On Entrapment

1. At trial, petitioner denied commiting the crime; he took the stand and testified that he accepted money from DeShazer as a personal loan, rather than "for or because of any official act" (18 U.S.C. 201(g)). Despite petitioner's hints to the contrary (Pet. Br. 15-16), this defense necessarily was inconsistent with his simultaneous claim that he was entrapped.

As we have noted, entrapment "is a relatively limited defense" that is grounded "in the notion that

Congress could not have intended criminal punishment for a defendant who has committed *all the elements* of a proscribed offense, but was induced to commit them by the Government" (*Russell*, 411 U.S. at 435 (emphasis added)). By definition, the entrapment defense comes into play "only when the Government's deception actually implants the criminal design in the mind of the defendant" (*id.* at 436). See *Sorrells*, 287 U.S. at 442.[25] The definition of entrapment therefore presupposes that all the elements of the offense are present and that the defendant acted with a "criminal design." As a logical matter, then, the jury can find that a defendant was entrapped only if it finds that a crime was in fact committed. This means that by seeking an entrapment instruction while denying commission of the crime, petitioner was "claim[ing] the right to swear that he had no criminal intent and in the same breath to argue that he had one that did not originate with him." *United States* v. *Henry*, 749 F.2d 203, 214 (5th Cir. 1984) (en banc) (Gee, J., dissenting). Needless to say, both of these assertions cannot be true.

---

[25] The Court in *Sorrells* reversed the holding of the court of appeals that "entrapment can be maintained only where, as a result of inducement, the accused is placed in the attitude of having committed a crime which he did not intend to commit, or where, by reason of the consent implied in the inducement, no crime has in fact been committed" (287 U.S. at 442 (citing 57 F.2d at 974)). One commentator has therefore observed that "[a] defendant who has not committed a criminal act with the requisite criminal intent cannot have been entrapped under federal law." Note, *Entrapment and the Denial of the Crime: A Defense of the Inconsistency Rule*, 1986 Duke L.J. 866, 889 (footnote omitted); see *id.* at 889 n.206.

2. a. For more than 60 years—even prior to the recognition of the entrapment defense by this Court in *Sorrells* [26]—it has been the rule in most circuits that a defendant cannot take inconsistent positions by simultaneously denying commission of the crime and arguing entrapment to the jury. That is now the approach taken by a substantial majority of the courts of appeals. At present, it appears that three circuits bar the assertion of an entrapment defense unless the defendant affirmatively admits commission of the crime.[27] Another five circuits have held that the defendant may not both deny commission of the crime and argue entrapment, although those courts foreclose the defendant from seeking an entrapment instruction only if he offers evidence contesting the elements of the offense.[28] Only two courts of appeals permit the defendant to testify (or introduce other evidence) contesting the existence of an element of the offense while simultaneously arguing entrapment

---

[26] See, *e.g.*, *Nutter* v. *United States*, 289 F. 484, 485 (4th Cir. 1923).

[27] These are the Third, Sixth, and Seventh Circuits. See *United States* v. *Hill*, 655 F.2d 512, 514 (3d Cir. 1981); *United States* v. *Whitley*, 734 F.2d 1129, 1139 (6th Cir. 1984); *United States* v. *Liparota*, 735 F.2d 1044, 1048 (7th Cir. 1984), rev'd on other grounds, 471 U.S. 419 (1985).

[28] These are the First, Second, Fourth, Tenth, and Eleventh Circuits. See *United States* v. *Annese*, 631 F.2d 1041, 1046 (1st Cir. 1980); *United States* v. *Mayo*, 705 F.2d 62, 72-73 (2d Cir. 1983); *United States* v. *Dorta*, 783 F.2d 1179 (4th Cir. 1986), cert. denied, No. 85-1713 (June 23, 1986); *United States* v. *Mora*, 768 F.2d 1197, 1198-1199 (10th Cir. 1985), cert. denied, No. 85-5437 (Jan. 21, 1986); *United States* v. *Smith*, 757 F.2d 1161, 1169 (11th Cir. 1985). In addition, the Eighth Circuit has endorsed this approach in dictum. *United States* v. *Kutrip*, 670 F.2d 870, 876 (8th Cir. 1982).

to the jury.[29] One other circuit permits a defendant to deny the existence of the mental element of the offense, although not the criminal acts, while arguing entrapment.[30]

In our view, the majority rule—which prevents the defendant from simultaneously denying the crime while arguing that (if the crime was committed) he was entrapped into committing it—is the sounder one. At the outset, petitioner is plainly incorrect in asserting (Pet. Br. 10, 14-15) that there is any constitutional infirmity in such a rule. The government, of course, bears the burden of proving every element of the offense beyond a reasonable doubt. But the entrapment defense is not constitutionally grounded (see *Russell*, 411 U.S. at 433), and the absence of entrapment is not an element of any offense. Instead, entrapment is a court-created affirmative defense that relieves the defendant of liability for what otherwise would be a crime. And since entrapment comes into play only when all the elements of the crime have been established, its existence does not "serve to negative any facts of the crime which the [government] is to prove in order to convict." *Patterson* v. *New York*, 432 U.S. 197, 207 (1977). See *Martin* v. *Ohio*, No. 85-6461 (Feb. 25, 1987), slip op. 6-7.

In this setting, Congress would be free to make the entrapment defense available on whatever conditions, and to whatever category of defendants, it believed appropriate (see generally *Martin*, slip op. 4-7; *Pat-*

---

[29] These are the Ninth and District of Columbia Circuits. See *United States* v. *Demma*, 523 F.2d 981, 982-985 (9th Cir. 1975) (en banc); *Hansford* v. *United States*, 303 F.2d 219, 221 (D.C. Cir. 1962).

[30] *United States* v. *Henry*, 749 F.2d 203, 207-214 (5th Cir. 1984) (en banc).

terson, 432 U.S. at 206-208)[31]—just as it could redraw the substance of the entrapment doctrine or, for that matter, eliminate the entrapment defense altogether. See generally *Russell*, 411 U.S. at 433.[32]

---

[31] Petitioners' reliance (Pet. Br. 14) on *Simmons* v. *United States*, 390 U.S. 377 (1968), and *Griffin* v. *United States*, 380 U.S. 609 (1965), which respectively involved the forced waiver of a constitutional right and prosecutorial action that burdened the exercise of a constitutional right, is thus entirely misplaced. Because the entrapment defense is not "of a constitutional dimension" (*Russell*, 411 U.S. at 433), no constitutional guarantees are implicated if the defense is made available only to defendants who do not contest their guilt.

[32] The Ninth Circuit's decision that a defendant may introduce evidence contesting the existence of the crime while simultaneously arguing entrapment, *United States* v. *Demma*, 523 F.2d 981 (9th Cir. 1975) (en banc), predated and cannot be reconciled with this Court's holdings in *Martin* v. *Ohio*, *supra*, and *Patterson* v. *New York*, *supra*. The Ninth Circuit (like petitioner, see Pet. Br. 12, 21-22) reasoned that the inconsistency rule somehow conflicts with the holding in *Sorrells* that entrapment may be raised by a plea of not guilty (see 287 U.S. at 452); the *Demma* court relied on *Sorrells* for the proposition that "non-entrapment is an essential element of every federal crime which is put in issue whenever evidence is introduced suggesting that an unpredisposed defendant was induced by the Government to commit the acts charged" (523 F.2d at 983). In fact, however, affirmative defenses generally may be raised by a not guilty plea (see generally Fed. R. Crim. P. 11, 12). And as the cases cited in text demonstrate, that procedural fact does not make the absence of any given affirmative defense an element of the crime that must be proved by the government. Congress thus retains the right to make affirmative defenses available on the terms that it sees fit. The Ninth Circuit also relied on what it believed to be the general proposition that inconsistent defenses are permitted in criminal cases (523 F.2d at 985 & n.6). Perhaps because the issue arises infrequently

In the absence of any explicit congressional statement, it is for the courts to formulate rules governing the availability of entrapment.[33] The courts have done so in a manner that is responsive both to the policies underlying the entrapment defense and to society's interest in furthering the accuracy of the truth-finding process at trial.

b. As its lengthy pedigree and wide acceptance suggest, the rule preventing defendants from simultaneously asserting entrapment and denying commission of the crime is not at odds with the policies underlying the entrapment defense, and it most fully accords with what this Court has described as "the very nature of a trial as a search for truth." *Nix* v. *Whiteside*, No. 84-1321 (Feb. 26, 1986), slip op 8. In the absence of an independent constitutional imperative permitting him to do so, a defendant is not free to present evidence or arguments to the jury that fail to advance the trial's function of establishing factual guilt or innocence. The defendant may not, for example, introduce irrelevant evidence; sim-

---

outside of the entrapment setting, however, the general propriety of inconsistent defense arguments is far from settled. See Note, *Entrapment and the Denial of Crime: A Defense of the Inconsistency Rule*, 1986 Duke L.J. 866, 878-879 & n.127. In any event, authority involving inconsistent defense arguments concerning the existence of elements of the offense (see, *e.g.*, *Johnson* v. *United States*, 426 F.2d 651, 653 n.3, 656 (D.C. Cir. 1970) (en banc) (rape defendant both denies act and argues consent))—as to which the government bears the burden of proof—has no bearing on the determination by Congress or the courts as to whether particular inconsistent *affirmative* defenses will be permitted.

[33] Fed. R. Civ. P. 8(e)(2) permits parties in civil actions to plead alternative theories; there is no parallel provision in the criminal rules.

ilarly, as we explain above, a defendant may not argue (or present evidence relating to) an affirmative defense that is factually insupportable (see *Bailey*, 444 U.S. at 416-417) or not legally cognizable (see *United States* v. *Eberhardt*, 417 F.2d 1009, 1012 (4th Cir. 1969), cert. denied, 397 U.S. 909 (1970)) —even if doing so might increase his chances of acquittal.

Permitting the defendant to argue entrapment after taking the stand and denying commission of the crime detracts in precisely the same way from "the integrity and the truth-finding function of our criminal trials." *United States* v. *Dorta*, 783 F.2d 1179, 1181-1182 (4th Cir. 1986), cert. denied, No. 85-1713 (June 23, 1986). When he denies an element of the offense, the defendant in effect testifies that he was not entrapped; in this case, for example, the government could hardly have "implant[ed] the criminal design" (*Russell*, 411 U.S. at 436) in petitioner's mind if, as petitioner testified, a criminal design never existed. If petitioner nevertheless obtained an entrapment instruction, he effectively would be asking the jury to acquit him on a view of the facts that he himself had testified is not true. See Note, *Entrapment and the Denial of the Crime: A Defense of the Inconsistency Rule*, 1986 Duke L.J. 866, 883-884.

Such an approach "is redolent of the sporting theory of justice" (*Henry*, 749 F.2d at 215 (Gee, J., dissenting)). "[T]here is no right whatever—constitutional or otherwise—for a defendant to use false evidence" (*Nix*, slip op. 15); once "[h]aving voluntarily taken the stand, [a defendant is] under an obligation to speak truthfully" (*Harris* v. *New York*, 401 U.S. 222, 225 (1971). See *Nix*, slip op. 9-10

(Blackmun, J., concurring in the judgment). A defendant therefore may fairly be held to the story that he tells under oath. And if the defendant is expected to tell the truth when he testifies, there is no justification for permitting him to seek a windfall acquittal on grounds that are inconsistent with his stated view of the facts. Cf. *Strickland* v. *Washington*, 466 U.S. 668, 695 (1984).[34] "'A criminal prosecution * * * is not a game. It incorporates a moral content and an ultimate concern with guilt or innocence that are inconsistent with permitting the accused to say, "I didn't do it, but if I did, the government tricked me into it'" (*Dorta*, 783 F.2d at 1182 (citation omitted)). Accordingly, at least where the defendant offers evidence contesting commission of the crime, he should not be entitled to an entrapment instruction at trial.[35]

---

[34] Presumably, a defendant who denies the crime while arguing entrapment hopes to benefit from either a "lawless" (*Strickland*, 466 U.S. at 695) or a confused jury. Indeed, the courts have noted that a denial of the crime combined with a claim of entrapment inevitably "will tend to 'confuse' the jury due to the 'inherent inconsistency' in saying at the same time that 'I didn't do it,' and 'the government tricked or seduced me into doing it.'" *United States* v. *Garrett*, 716 F.2d 257, 270 (5th Cir. 1983) (citations omitted), cert. denied, 466 U.S. 937 (1984). See Note, *supra*, 1986 Duke L.J. at 888.

[35] Several courts have held that a defendant need not concede commission of the crime to obtain an entrapment instruction, so long as the defense does not introduce evidence that is inconsistent with the government's position. See note 28, *supra*. Because petitioner in fact denied commission of the crime in this case, there is no need for the Court to determine the validity of this position. Nonetheless, we believe that there is much force to the rule adopted by the Third, Sixth and Seventh Circuits (see note 27, *supra*), which prohibits a defendant from arguing entrapment if he has not

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

CHARLES A. ROTHFELD
Assistant to the Solicitor General

AUGUST 1987

---

conceded commission of the crime, even if he did not introduce any evidence at trial. Even when the defendant does not deny his guilt from the stand or otherwise offer evidence contesting the government's proof on the elements of the offense, the defendant's argument to the jury is based on inconsistent contentions: it cannot simultaneously be true that the elements of the offense were not present and that the defendant was entrapped. And the entrapment defense is still being invoked by someone who, according to his argument to the jury, did not commit the offense at all and therefore could not have been entrapped by a government agent into commission of the crime. On the other hand, we recognize that, as a general matter, a defendant may put the government to its proof and take advantage of any defenses raised by the evidence. And we recognize that, in cases where the defendant has not offered evidence denying commission of the offense, some courts have felt that it unreasonably taxes the defendant's right to put the government to its proof on the issue of guilt for a court to require the defendant to stipulate to the commission of the offense in order to enjoy the benefits of the entrapment defense. See, *e.g.*, *United States* v. *Henry*, 749 F.2d at 211; *United States* v. *Annese*, 631 F.2d at 1046-1047; *United States* v. *Demma*, 523 F.2d at 984.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1987 181483 40461